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February 7, 2006

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KY REGISTRY OF
ELECTION FINANCE

VIA UPS

Office of General Counsel
Registry of Election Finance
140 Walnut Street
Frankfort, KY 40601

Re: Advisory Opinion Request

Dear General Counsel:

I am writing on behalf of the Chamber of Commerce of the United States of America ("Chamber"). Pursuant to Ky. Rev. Stat. Ann. § 121.135, I respectfully request an advisory opinion concerning the application of Kentucky's campaign finance laws to the Chamber's proposed activities.

I. BACKGROUND

The Chamber is an incorporated not-for-profit trade association that is exempt from federal income taxation pursuant to section 501(c)(6) of the Internal Revenue Code. The Chamber is made up of members which are business corporations of all sizes and from all sectors of the economy. One of the Chamber's functions is to advance the interests of its members by educating the public on issues the Chamber deems important.

To do so, the Chamber engages in mass media communications that may refer to clearly identified candidates for electoral office, but do not expressly advocate their election or defeat. Instead, the communications eschew words such as "vote for," "defeat," or "reelect." See, e.g., Chamber of Commerce of the U.S. v. Moore, 288 F.3d 187 (5th Cir. 2002). In addition, the Chamber does not coordinate its efforts with any of the candidates identified in the communications or with their opponents. The Chamber intends to engage in a public educational program of this sort in Kentucky.

II. LEGAL ANALYSIS

A. Campaign Finance Statutes

The Kentucky campaign finance laws prohibit the use of corporate funds "for the purpose of aiding, assisting, or advancing any candidate for public office in this

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state in any way whatever.” Ky. Rev. Stat. Ann. § 121.035. Furthermore, an entity must register and report as a “permanent committee” if it satisfies the following definition:

[A] group of individuals, including an association, committee or organization, other than a campaign committee, political issues committee, inaugural committee, caucus campaign committee, or party executive committee, which is established as, or intended to be, a permanent organization having as a primary purpose expressly advocating the election or defeat of one (1) or more clearly identified candidates, slates of candidates, or political parties, which functions on a regular basis throughout the year;....

Id. § 121.015(3)(d) (emphasis added).¹

B. Statutory Interpretations

It does not appear that the Registry or the courts have interpreted the phrase “for the purpose of aiding, assisting, or advancing any candidate” in section 121.035. The U.S. Supreme Court has, nonetheless, construed similar language in federal campaign finance law to prohibit corporate communications to public only if they contain “express advocacy” of the election or defeat of a clearly identified candidate. See FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (“MCFL”).

The Registry has interpreted the phrase “expressly advocating.” In Advisory Opinion 93-028 (Dec. 12, 1993), the Registry addressed the question of whether advertising “necessarily must contain literal words such as ‘Do not vote for’ in order to constitute ‘expressly advocating’” as defined by the U.S. Supreme Court in its seminal campaign finance case, Buckley v. Valeo, 424 U.S. 1 (1976). The Registry answered the question in the negative concluding that “speech need not include any of the words listed in Buckley [literal advocacy words] to be expressed advocacy under the act, but must, when read as a whole, and with limited reference

¹ Variants of the operative phrase “expressly advocating” appear elsewhere in the Kentucky campaign finance laws and similarly trigger legal obligations. See Ky. Rev. Stat. Ann. §§ 121.015(12) (definition of “independent expenditure”); 121.190(a) (identification by advertisers).

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to external events, be susceptible of no other reasonable interpretation as exhortation to vote for or against a specific candidate.” Id. (brackets in original).²

Two years ago, the U.S. Court of Appeals for the Sixth Circuit addressed a challenge to Kentucky’s statutory prohibition on “electioneering” within 500 feet of a polling place. See Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004). Coming within months of the U.S. Supreme Court’s most recent campaign finance decision in McConnell v. FEC, 540 U.S. 93 (2003), the Sixth Circuit struck down the statutory definition of “electioneering” as overbroad. Noting that McConnell “left intact the ability of courts to make distinctions between express advocacy and issue advocacy,” the court adopted a limiting construction to “protect[] speech which does not directly seek to elect or oppose specific candidates.” Id. at 664, 665. The court went on to hold that the term “electioneering” may “permissibly apply only to speech which expressly advocates the election or defeat of a clearly identified candidate.” Id. at 665. The court recognized Buckley’s requirement that “express advocacy” is limited to words such as vote for, elect, support, cast your ballot for, Smith for Congress, vote against, defeat, and reject.” Id. at 663-64.

The General Counsel to the Registry recently issued the attached Staff Report in Sandy Jones v. Alan Baker, Thomas Baker and Citizens for Honest Government, Case No. 2004-207 (April 5, 2005) (“Staff Report”). The Staff Report assessed much of the above-discussed precedent to conclude that the term “express advocacy” and its variations used in the Kentucky campaign finance statutes must be understood to apply only to “express advocacy as defined by the magic words test ... under the Buckley rationale.”

² The Registry based its conclusion on the aberrant FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) decision issued by the U.S. Court of Appeals for the Ninth Circuit holding that explicit words of advocacy such as “vote for” are not required in order for a communication to constitute “express advocacy.” Oddly, the Furgatch decision overlooked the then just-issued U.S. Supreme Court decision in MCFL which reaffirmed Buckley’s requirement of explicit words of advocacy. Accordingly, the Furgatch opinion has been uniformly rejected by other circuit courts. See Moore, 288 F.3d at 193-95 (collecting cases). A subsequent Ninth Circuit panel has even sought to align the Furgatch opinion with the federal consensus. See California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1098 (9th Cir. 2003) (after describing Furgatch as “standing apart from other circuit precedent,” the panel ruled that Furgatch actually holds that “express advocacy must contain some explicit words of advocacy” (emphasis in original)).

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III. QUESTIONS PRESENTED

1. Does the statutory prohibition on the use of corporate funds "for the purpose of aiding, assisting, or advancing any candidate" in section 121.035 of Kentucky's campaign finance laws apply to the Chamber's proposed non-"express advocacy" communications described in section I of this request?
2. Does the Staff Report constitute an accurate interpretation of the phrase "express advocacy" such that the Chamber's proposed activities described in section I of this request will not subject the Chamber to regulation as a "permanent committee" or any other provisions of the Kentucky campaign finance laws that incorporate the "express advocacy" standard?

Sincerely,



Jan Witold Baran

Attachment